

UNITED STATES BANKRUPTCY COURT  
NORTHERN DISTRICT OF TEXAS

IN RE: Case No. 17-32255-BJH  
WALNUT HILL PHYSICIANS  
HOSPITAL, LLC  
Debtor.  
SCOTT M. SEIDEL, TRUSTEE, Adv. No. 18-03033-BJH  
Plaintiff, 1100 Commerce Street  
v. Dallas, TX 75242  
ST. JUDGE MEDICAL, S.C.,  
INC.,  
Defendant. June 21, 2018  
9:09 a.m.

TRANSCRIPT OF MOTION TO COMPEL RE: DISCOVERY  
DISCOVERY RESPONSES AND PRODUCTION FILED BY  
PLAINTIFF SCOTT M. SEIDEL  
BEFORE HONORABLE DOUGLAS D. DODD  
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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St.JudeResponseContemptApp\k\001

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1 (The following is the requested excerpted portion  
2 of the proceedings.)

3 MS. BIALZIK: Good morning, Your Honor. I didn't get  
4 a chance to make my appearance before. I am Melinda Bialzik,  
5 here with my colleague Samuel Wisotskey from Kohner, Mann &  
6 Kailas in Wisconsin on behalf of St. Jude. Thank you.

7 THE COURT: Good morning.

8 MR. RUKAVINA: May I begin, Your Honor?

9 THE COURT: You may.

10 MR. RUKAVINA: Your Honor, obviously we're here on  
11 the Trustee's motion to compel discovery, and I think -- if I  
12 can give Your Honor just a brief kind of a background of how we  
13 see this case. I've been doing this for 17 years. I've never  
14 tried a preference case. I was a law clerk for two years to  
15 Judge Robert L. Jones. He never tried a preference case. The  
16 trustee has been a trustee for almost 30 years and he can't  
17 remember if he's ever tried a preference case. And the reason  
18 why we don't try preference cases frankly is because capable  
19 attorneys, knowing all the facts, knowing the law tend to know  
20 where a preference case should settle and, therefore, they  
21 settle them.

22 In this case, Your Honor, we've sent 60 preference  
23 demand letters. We've already settled 20 preferences without  
24 the need for filing suit. We have filed only a handful of  
25 suits, about ten suits, and those were filed for one of two

1 seasons, either the preference defendant did not get back to us  
2 on our preference communications and demands, or the case  
3 involves unique facts, such as Your Honor will hear is the case  
4 here with respect to a consignment agreement and also a  
5 503(b) (9).

6 So all that is to say that trustee and counsel in  
7 order to be able to do their job and efficiently administrate  
8 an estate and not burden courts with needless actions need to  
9 have discovery. They need to have information, so they can  
10 make informed decisions.

11 And St. Jude, Your Honor, in this case, despite  
12 months of waiting for discovery, has not afforded us reasonable  
13 discovery, such that we can take additional discovery or even  
14 form a final opinion as to what the theory of the case is and  
15 where this case should go.

16 There are a few unique facts about this case that I'm  
17 sure the Court has seen in our moving papers. St. Jude has  
18 filed a \$130,000 503(b) (9) claim. 503(b) (9), as the Court of  
19 course knows, requires amongst other things that St. Jude prove  
20 ordinary course. Ordinary course is also an affirmative  
21 defense. It also requires that St. Jude prove value. So we  
22 have a \$130,000 503(b) (9) in addition to the large preference.

23 The other unique fact about this case is that the  
24 trustee has been informed and I think -- I don't know if  
25 there's a dispute about this, that St. Jude mistakenly

1 delivered the same shipment twice on the eve of bankruptcy. In  
2 other words, the debtor made an order, placed an order for X, Y  
3 and Z, St. Jude delivered X, Y and Z, and then mistakenly  
4 delivered X, Y and Z again. Just yesterday we went to the  
5 hospital, the landlord finally permitted us access, and we took  
6 these boxes of what was delivered mistakenly we were informed  
7 by the debtor's former manager. That's important because this  
8 again goes to a 503(b)(9) and a new value analysis and,  
9 therefore, why communications with the debtor are important.

10 The third thing that makes this case unique is, as  
11 Your Honor has seen in our appendix, Exhibit I, there was a  
12 consignment agreement in place here, and as we have briefed,  
13 consignment governed by the UCC can take one of two forms and  
14 which of those forms it is basically decides whether title  
15 transfers and when title transfers. That's critical for any  
16 new value analysis. That's critical for any preference  
17 analysis.

18 So we do have potentially a consignment agreement  
19 here and that's certainly what the trustee has been informed  
20 from his internal analysis prior to filing this adversary  
21 proceeding.

22 And the final thing that's a little bit unique about  
23 this case, Your Honor, is that according to St. Jude's own  
24 appendix in response to this motion, they did put the debtor on  
25 a credit hold. That I think goes right to one of the facts or

1 factors the courts look at for ordinary course matters.  
2 Putting the debtor on a credit hold certainly affects what  
3 happens with contemporaneous exchange or prepayment or whether  
4 antecedent debt, et cetera.

5 All this is to say that the trustee has a legitimate  
6 bonafide need for relevant discovery regarding these unknown  
7 issues. In other words, this is not an ordinary preference  
8 case where they give us the invoices, they give us the packing  
9 slips, they give us whatever contract there might be, they give  
10 us bills of lading and then the trustee can figure out, okay,  
11 what is the ordinary course, what is the value.

12 This is a case very much where we see how the people  
13 on the ground were treating this. We need to see very much  
14 what the actual practice was to see which of these consignment  
15 agreements this was. Your Honor, we've given you an exhibit  
16 here, one of their own invoices, I walk you through it, which  
17 shows the date of delivery of a heart valve, the date of  
18 delivery of the heart valve to the hospital is after the date  
19 that that heart valve was implanted into the patient. That's  
20 impossible. That's impossible that a heart plant -- that a  
21 heart valve implanted on May 28th let says was delivered on  
22 June 1.

23 So, again, we're not dealing with a black and white  
24 simple situation here. We're dealing with local sales people.  
25 We're dealing with local sales people perhaps delivering heart

1 valves and stems and other implantables and pacemakers on an  
2 as-needed basis because the patient is dying on the table.  
3 FedEx doesn't come fast enough to save a patient's life.

4 Again, we need these communications with the sales  
5 people. We need whatever contracts govern the relationship  
6 with the sales people. We need all communications with the  
7 debtor. These are reasonable discovery requests that I humbly  
8 submit you would have in any case of any size. And for St.  
9 Jude to flat reject those discovery requests is a little bit  
10 unprecedented I would suggest.

11 This is not a \$20,000 case. This is not a simple  
12 case. And this is a case where we're testing the mettle or the  
13 merits of their own 503(b)(9) and their own affirmative  
14 defenses.

15 I add to that the boilerplate and the generic and the  
16 general objections that St. Jude has asserted which dozens and  
17 dozens of cases from this court say are improper, and perhaps  
18 Your Honor thinks that we're being a stickler on that. Perhaps  
19 Your Honor thinks we're being unreasonable, but we're not  
20 because counsel and parties hide behind those general and  
21 boilerplate objections, so that you never really know what they  
22 produced and never really know what they've withheld.

23 And with due respect to St. Jude, in all their  
24 communications back to us it's double speak. It's Orwellian  
25 double speak. If they have really produced everything that's

1 responsive that's in their possession, custody and control,  
2 then state so in the response to the RFI. That's what this  
3 court's precedent requires. If they have withheld a document  
4 by category or individually, then state so, so that we know  
5 what's been withheld. If they are relying on an objection,  
6 then state so, so that the Court today can decide whether that  
7 objection is valid. And if they are asserting a privilege,  
8 then state so and state what is withheld on the base of  
9 privilege and provide a privilege log as necessary. They  
10 cannot hide behind boilerplate or general objections.

11 And, finally, Your Honor, it certainly did not  
12 prejudice us, but they did get their objections on file or  
13 rather to us late and we submit that they've waived any  
14 objections that otherwise be valid. Again, I can't tell you  
15 that we were prejudiced by that short delay, but they have not  
16 sought any relief from that.

17 So, Your Honor, that is the bulk of our case.  
18 There's not much more I can say. I'm sure Your Honor has read  
19 our moving papers. We're seeking basic minimal discovery here  
20 that is targeted and that cannot be overburdensome for a multi  
21 billion dollar company like that. Unless Your Honor has any  
22 questions, I'll yield the podium.

23 THE COURT: No, I have none. Let me hear from St.  
24 Jude.

25 MS. BIALZIK: Good morning, Your Honor. Your Honor,

1 we agree that preference cases are typically settled without  
2 the need for a trial because parties can evaluate the  
3 information and determine whether there are valid defenses.  
4 The same is true of a 503(b)(9) case, and in both cases here  
5 where we have a 503(b)(9) case that is based on claims of  
6 product delivered within the 20-day period and a preference  
7 action where the defense is a new value defense, and new value  
8 again is based on product that is delivered within the 90-day  
9 period that has the value, those are both very straightforward,  
10 very routine claims and defenses that can be evaluated off of  
11 invoices and proof of delivery.

12 And, Your Honor, St. Jude has provided invoices,  
13 proof of delivery, packing slips. Now, we understand that  
14 there may be something that the Trustee finds confusing on an  
15 invoice. For example, he's incorrect in stating that there's a  
16 date of delivery that's after the date of the procedure, but  
17 there is on the invoice what appears to be a ship date after  
18 the date of delivery. We understand how that might be  
19 confusing. A targeted interrogatory request could have  
20 resolved that because, as we put in the declaration of Richard  
21 Genovese, there is an explanation for that, and also Gregory  
22 Howett (phonetic). The explanation for that is it's simply a  
23 computer function.

24 What happens here in those cases, as Genovese  
25 explained, when you have a hand carry delivery, meaning, as Mr.

1 Rukavina indicated, that a sales agent is on site at the  
2 hospital, usually in the delivery room, and he delivers product  
3 to Walnut Hill during the procedure, that is the implant date,  
4 that is the delivery date, that is the date of service. That  
5 is consistent on all documents we provided.

6           Then the sales agent goes and he enters information  
7 into his computer system, and at some shortly thereafter date  
8 his computer system uploads information into the St. Jude  
9 billing system. The ship date reflects simply the date that  
10 the information is transferred from one computer system to  
11 another.

12           Now, again, had we had targeted discovery on that  
13 kind of a question, we could have produced declarations, which  
14 we have now put in the record, and we have offered from the  
15 very beginning to provide Mr. Genovese himself and Mr. Howell,  
16 if the trustee would like to come to Illinois, to sit for a  
17 deposition to explain the procedures, to explain that there was  
18 no consignment relationship. There simply is no evidence  
19 anywhere of a consignment relationship. Yes, the agreement  
20 provided that one could have been set up, but there's no  
21 evidence it was set up. We have testimony confirming it was  
22 never set up.

23           All of the documentation indicate a delivery date  
24 that precedes the date of invoice, and, again, Mr. Genovese is  
25 available. And as the Federal Rules of Civil Procedure

1 explicitly state in 26(b) (2), if there's a less burdensome  
2 method for a party to obtain the information it needs, that's  
3 what should be pursued.

4 Now, we don't even understand exactly what it is that  
5 the trustee thinks that St. Jude should be looking for. St.  
6 Jude has produced all of the records that it has from the  
7 places that it knows those records are likely to exist, its  
8 computer systems that have billing records and invoice records.  
9 It has not searched through archived e-mails to see if there  
10 might be some random communication that references Walnut Hill  
11 because there's no reason to do that. We have all the  
12 information we need. It's burdensome. It's expensive. The  
13 trustee has acknowledged searching archived records is  
14 expensive.

15 And the trustee has what it needs. The trustee could  
16 ask Mr. Genovese to sit for a deposition. Certainly if  
17 something came up there that, again, a narrow, targeted reason  
18 for some additional discovery requests, that would be  
19 appropriate, but this broad fishing expedition is not.

20 And let me be clear, St. Jude is not hiding behind  
21 any boilerplate objections. We have been explicit in phone  
22 conversations and in writing that there are no documents that  
23 are - or information that is being withheld based on  
24 boilerplate objections. We told the trustee he could deem our  
25 responses amended to reflect that, if that's important to him,

1 But we are relying solely on specific objections that we've  
2 been willing to discuss with the Trustee from the beginning.

3 And, again, we've said, take Mr. Genovese's  
4 deposition, get the information you need. This is  
5 straightforward, and we believe that whatever questions he has  
6 about the way these invoices look could be answered in a much  
7 less burdensome and difficult manner.

8 THE COURT: All right. Trustee, response, anything?

9 MR. RUKAVINA: Yes, Your Honor. I think counsel's  
10 arguments prove exactly why discovery is appropriate here. She  
11 says that there's a consignment contract, but the parties never  
12 had a consignment agreement. She says that there's apparently  
13 mistakes with the computer programs that print wrong dates on  
14 invoice dates. This is why communications regarding these  
15 matters are critical, so we can test, Your Honor, what counsel  
16 says, so we can test what Mr. Genovese says. Of course we will  
17 depose Mr. Genovese, but we should not be required to depose  
18 him before we see his own governing contracts and his own  
19 communications.

20 All you have to look at, Your Honor, is Exhibit J in  
21 our appendix. This gentleman was implanted with a pacemaker  
22 and that Exhibit J expressly says that the date of implant was  
23 May 24th, the corresponding invoice says ship date May 31st,  
24 invoice date June 12th.

25 Your Honor, with respect to them saying that they're

1 withdrawing their general objections or boilerplate objections,  
2 that's not what they says in Exhibit G. In Exhibit G in a  
3 letter, in a letter, not in a formal response, they say that to  
4 the extent you deem our objections and responses revised,  
5 accordingly, you can deem them revised by this debtor. Well,  
6 Your Honor, serve a clean response to discovery that omits the  
7 general and boilerplate objections.

8 And, Your Honor, this is not a fishing expedition.  
9 These are targeted discovery requests. We're happy to discuss  
10 further narrowings of them, if required, once they get past  
11 their general objections. These are not discovery requests  
12 that say any and all communications going back years. These  
13 are targeted requests for Mr. Genovese's communications and  
14 contracts, the other sale person's communications and  
15 contracts, and communications going back and forth with the  
16 debtor. That's targeted, Your Honor. Thank you.

17 THE COURT: All right. I know you -- all counsel  
18 know that judges love discovery disputes. We stay up at night  
19 hoping that discovery disputes come in, as I did last night.

20 First of all, the trustee I think pointed this out,  
21 but for the benefit of everybody, including the trustee, this  
22 is not a hearing on a motion for summary judgment. I am not  
23 deciding whether there was, whether there was not a  
24 consignment. However, there are enough papers in there that  
25 suggest that that is an area of relevance to the inquiry.

1                   And we're not talking about \$75,000 that somebody  
2 paid to an auto parts place in the 90 days before bankruptcy.  
3 This is big money on both sides. So I think it justifies a  
4 little extra time and attention.

5                   Having said that, I would tell the trustee's counsel  
6 that, you know, not everybody settles. You know, if everybody  
7 settled, you wouldn't need me and the other people who, you  
8 know, get these really nice robes. So the fact that St. Jude  
9 is not rolling over is -- that's really of no import, and I am  
10 not viewing anybody's position in this as purely belligerent  
11 for the sake of being belligerent.

12                  So with those comments in mind, here's the first  
13 thing I want to do, I want to go through the general  
14 objections. The trustee has got the better of this, but not  
15 entirely. I won't tell you what I pencilled in the margin of  
16 my copy of the general response, which was attached to the  
17 trustee's appendix, and I'm specifically looking at Document  
18 10, which purports to be St. Jude's combined preliminary  
19 responses, Exhibit D to the trustee's -- in the trustee's  
20 appendix.

21                  This puts me in mind of an old railroad lawyers, what  
22 we call here general denial, you know, with a -- and the first  
23 year associate who simply goes to the Federal Rules and ticks  
24 off every single affirmative defense and says, you know, maybe  
25 it'll apply, maybe it won't, but what can it hurt to throw it

11 in.

2                   So you all know how this works. So we're going to go  
3 through this, and the big picture here is that St. Jude is  
4 going to have to amend its responses, both with respect to  
5 these general objections to make it absolutely clear what's  
6 been produced and what is not being produced, and if there is a  
7 claim of privilege, St. Jude is going to have to make that  
8 claim unambiguously and it's going to have to provide a  
9 privilege log to the trustee within a time that we can talk  
10 about. All right.

11                   So the general responses objects to the extent they  
12 impose any objection, this is Number 1, greater or inconsistent  
13 with the Federal Rules of Bankruptcy Procedures and the Federal  
14 Rules of Civil Procedure. You know, that's an objection that  
15 is just overbroad. You can make that objection -- make an  
16 objection, if that's an objection, in each response, so that's  
17 got to come out.

18                   Number 2, you generally object to the extent that the  
19 requests are overbroad, not sufficiently particularized.  
20 That's humbug too. You make that objection and response to  
21 each discovery request, not a blanket objection. Once again  
22 that's to eliminate any doubt about what is being produced or  
23 what is being answered and what is not being answered.

24                   Number 3, objection to the extent that they request  
25 disclosure of confidential and proprietary information. That

1 can be raised in response to each discovery request, no blanket  
2 objections.

3 Number 4, the same sort of objection, but this is  
4 directed to attorney/client privilege and the work product  
5 doctrine, the same thing, you have to urge that a response to  
6 each discovery request.

7 I'm not really sure what Number 5 is, but generally  
8 discovery is not directed to post-lawsuit communications among  
9 the lawyer and the clients. Those are -- I think the trustee  
10 conceded that in his filings, but I don't know why that's  
11 necessary to include it, but I don't think it's necessarily  
12 appropriate.

13 But I move to six now, it's a general objection on  
14 the basis of whether it's discoverable under Rule 26. You just  
15 have to make that in connection with each discovery request  
16 rather than a blanket objection.

17 Number 7, objection to the request that -- the  
18 request seek documents already in the possession of the debtor  
19 or the trustee. Well, that's an inappropriate objection  
20 because it's perfectly permissible to ask for copies of  
21 documents. There may be non-identical copies of documents, and  
22 the fact that the trustee or the debtor may already have them  
23 it does not necessarily eliminate the probative value of St.  
24 Jude's possession of the documents in production of them.

25 The objections to the definitions that instructions

1 related -- you know, that's just something you have to make in  
2 response to each individual discovery request, although St.  
3 Jude is -- rather the Trustee has taken a page out of every  
4 pattern or discovery request for the past 40 years. Every year  
5 they become a little bit more onerous. With the advent of  
6 electronic information it became pluperfactly, prismatically  
7 onerous.

8 So, all right, now let's go to the -- well, actually  
9 Number 10, discovery is continuing, I don't know that you need  
10 to include that, and -- because the rules impose a continuing  
11 obligation to make discovery.

12 And Number 11 is where you -- where St. Jude sort of  
13 creates the problems for itself, but it goes without saying, if  
14 the general objections are problematic, then incorporating them  
15 into the individual response is even more problematic.

16 So all right, Interrogatory 1, and all these  
17 interrogatories and requests for production commence with the  
18 phrase subject to the general response.

19 MR. RUKAVINA: Your Honor, we -- not to interrupt the  
20 Court, but --

21 THE COURT: Yes.

22 MR. RUKAVINA: -- counsel and I agreed that we don't  
23 have a problem with the interrogatories thus far, so certainly  
24 if Your Honor wants to comment on them, but -

25 THE COURT: Okay. No, no, let's go -- let's -- I was

1 going to say about the interrogatories it's simply the lead in  
2 to all of them. It's incorporating general responses.

3 All right. The first set of production, all  
4 communications between St. Jude and the debtor that relate to  
5 or evidence an agreement to provide goods to the debtor,  
6 including documents or communications by which the debtor  
7 agreed to same. Okay. St. Jude's objection is that it's  
8 overbroad and that it's non-proportional to the needs of the  
9 case. Trustee, I -- you contend that that's not appropriate,  
10 correct, and that, in fact, it's not overbroad, right?

11 MR. BUKAVINA: Correct, Your Honor.

12 THE COURT: All right. What does St. Jude say?

13 MS. BLASZIK: Your Honor, the term relate to is  
14 extremely broad, and any communication that relates to any  
15 agreement would cover a myriad of things that are tangential  
16 and extraneous. We have provided all of the actual agreements  
17 that we have in NOA. We provided the invoice records. I don't  
18 know what we would even be searching for if we were to look  
19 through archived e-mail records for any reference to Walnut  
20 Hill that could be considered relating to their agreement to  
21 provide goods. Their entire relationship was an agreement to  
22 provide goods.

23 MR. BUKAVINA: Well, but as the --

24 THE COURT: Well, you know, you urge the ordinary  
25 course of business actually -- well, you originally urged, and

1 I think your answer that the ordinary course of business was an  
2 affirmative defense. Now, I understand there's correspondence  
3 in which you may have abandoned that, but your 50 - your  
4 priority claim under 507 and 503 that includes a component of  
5 ordinary course of business.

6 So why does that not still keep the communications  
7 between St. Jude and Walnut Hill relevant and discoverable  
8 within the meaning of Rule 26?

9 MS. BIALZIK: Well, Your Honor, the 503(b) ordinary  
10 course of business is a different ordinary course of business.  
11 The ordinary course of business where it's a defense to a  
12 preference claim is looking at ordinary course for payment  
13 purposes. And we are not relying on that and if the we need --  
14 if the Court needs us to formally withdraw it we can because we  
15 have a complete now value defense.

16 In terms of the 20 days, I mean, the evidence is  
17 clear that the parties were ordering goods, their medical  
18 supplies for the business of the debtor. There's nothing in  
19 there to suggest that this is not part of the debtor's ordinary  
20 course of business here. And so what are we searching for,  
21 Your Honor?

22 There's, you know, records that goods were ordered  
23 and delivered and I'm not even sure what possibly could exist  
24 in some random file or e-mail communication here that relates  
25 to this agreement but we've provided enough to show that the

1 goods were delivered pursuant to being ordered by a medical  
2 facility and their medical products.

3 MR. RUKAVINA: Well --

4 THE COURT: The Trustee has said that there was a --  
5 the business was winding down by the time -- by the time we  
6 were 20 days pre-petition. I think that's what I understood  
7 the Trustee to say. Is that correct?

8 MR. RUKAVINA: That's part of what we're saying, Your  
9 Honor. And just to refresh the Court's memory, there is  
10 evidence of a consignment. St. Judge is saying there was no  
11 consignment. So I submit that there's an ambiguity here and  
12 the communications leading up to whatever agreements there were  
13 or whatever communications might have modified those agreements  
14 is absolutely relevant. Because let's not forget that for a  
15 503(b)(9) it's got to be 20 days. So, what date did title  
16 transfer to any goods that may or may not have been shipped?  
17 What date were goods ordered when the Hospital ceased  
18 operating?

19 THE COURT: What other documents are there to  
20 produce?

21 MR. RUKAVINA: And, Your Honor, there may not be but  
22 I suspect given what we've seen so far in other cases that  
23 there's going to be whoever is the accounting person at St.  
24 Judge, and we don't know who that is, there's going to be  
25 communications putting the debtor on a credit hold, maybe

1 changing the terms of the consignment agreement. There may be,  
2 I don't know if there is, negotiations by e-mail leading up to  
3 the consignment agreement. There may be communications with  
4 the salesman saying hey, we don't have the money to pay for  
5 this. Can we pay you for this old invoice or something.

6 I don't know but I don't think it's going to take St.  
7 Jude but a little bit of attorney time to go target certain  
8 people's e-mails and run certain word searches like Walnut Hill  
9 or like Rick Leonard (phonetic) or something like that. And if  
10 there's nothing that they can tell us that after a reasonable  
11 search they found nothing, no problem.

12 THE COURT: These are all -- St Jude, are these all  
13 on electronically accessible databases?

14 MS. RUKAVINA: They are archived because St. Jude had  
15 a process of expunging e-mails within 30 days. We're not even  
16 sure what exactly is in the archives but we know that it is  
17 expensive and onerous for us to go and do that search. And the  
18 point is that we've offered, again, we've offered testimony  
19 from the sales agent who was there who can confirm whether or  
20 not -- it's a simple question - either there was consignment  
21 inventory or there wasn't. And if he can provide the  
22 testimony, an oral testimony that is consistent with the  
23 documents, why should St. Jude have to go through the burden of  
24 trying to get an IT specialist to come in to figure out what's  
25 on the archive.

1                   The Trustee, in his own papers, has admitted he's  
2 not searching the debtor's records which he has archived. He  
3 could look for these same e-mails between the parties talking  
4 about the lack of a consignment relationship in the debtor's  
5 records and he doesn't want to do it because it's expensive.  
6 The same is true for St. Jude and there's no reason for it  
7 because we have plenty of evidence and other less burdensome  
8 ways for the Trustee to ask his questions directly from the  
9 sales agent who was responsible.

10                   MR. KUKAVINA: Might I reply, Your Honor?

11                   THE COURT: Yes.

12                   MR. KUKAVINA: Your Honor, the problem with St.  
13 Judge's position is that it is their burden evidentially to  
14 prove what counsel just said. And they have not proven  
15 whatever burden she alleges there may be. Now, I represent my  
16 law firm all the time. And de-archiving e-mails is as simple  
17 as me sending an e-mail to my IT people saying crack open this  
18 archived e-mail. It's we're not talking about e-mails that  
19 are ten years old that are stored off site. We're talking  
20 about a very simple process of de-archiving and, literally,  
21 it's the press of a button. And the reason why we haven't  
22 searched all of the debtor's communications is because we don't  
23 know where to search.

24                   So, it's not true what counsel said that we're just  
25 flat refusing to. We have searched, for example, Rick

1 Leonard's e-mail communications. It's not hard because we know  
2 that he's the purchasing manager. But we have something like  
3 315 employees. So, for us to go through the 350, because we  
4 don't know, we're not the debtor, that is a much, much, much  
5 greater burden than for St. Jude to send an e-mail to five or  
6 ten employees saying, hey, do you have any communications with  
7 the debtor going back -- remember the Hospital was only open  
8 for two and a half years. We're not talking about 15 years of  
9 communication.

10 THE COURT: All right, now --

11 MS. BIALZIK: Your Honor --

12 MR. RUKAVINA: We are administratively --

13 MS. BIALZIK: Your Honor, employees wouldn't have  
14 access to their e-mails. I just said, those e-mails are purged  
15 after 30 days so it is an onerous deal of going and getting an  
16 IT specialist to go in and look at archived files. I don't  
17 even know where those archived -- I don't know where he's  
18 getting information about what this process would be but it's  
19 not as simple as asking employees to check their own e-mails  
20 because those employees don't have access to their own e-mails.

21 MR. RUKAVINA: Your Honor -

22 THE COURT: Right. But I'm -- okay, let me see if I  
23 can save everyone's breath. I'm overruling the objection and  
24 I'm going to give St. Jude 14 days to produce the other  
25 documents. If I need to be specific, it's archived e-mails and

1 if 14 days is unreasonable, I'm amenable to extending that time  
2 by motion and I would expect counsel to cooperate on that. But  
3 we're not talking about e-mails from the dawn of the e-mail  
4 era. We're talking about e-mails 14 months ago. That's not  
5 terrible long -- 5, 16 months ago.

6 So, all right, Request Number 2, all documents and  
7 communications within one year before the petition, that  
8 details shipments of goods from St. Jude to the debtor  
9 identifying the goods shipped, prices, date of shipping and the  
10 date the debtor ordered the goods. Once again the objection  
11 that it is overbroad, it is not proportional to the needs of  
12 the case it's subject to those general objections and in that  
13 objection there were documents produced in response to the  
14 first interrogatory. I would suggest that -- well, let me hear  
15 the argument.

16 MR. RUKAVINA: Your Honor, the argument is the same  
17 for Number 3 -- Request Number 2 and Number 3. I think that  
18 St. Jude has produced everything that's responsive so if that's  
19 the case then all they have to do is withdraw these general  
20 objections and say hey, we produced what's responsive. If they  
21 have not produced what's responsive, then I have further  
22 argument.

23 THE COURT: St. Jude?

24 MS. BIALZIK: St. Jude has produced everything that  
25 we're aware of that's responsive.

1 THE COURT: All right.

2 MR. BUKAVINA: Other than communications, of course.

3 MS. BIALZIK: Other than communications.

4 THE COURT: Right and then -

5 MS. BIALZIK: Yeah, and that's what - in addition  
6 was the communications because, again, we felt like that was  
7 overly broad but.

8 THE COURT: Right. All right. Well, you've made  
9 that argument and I've ruled.

10 Okay. As to Request 2 and 3, the ruling is to amend  
11 the Request to any responses to delete the objections within 14  
12 days.

13 All right, Request 4 is communications related to any  
14 assertion in the motion, which I assume is a 503(b) motion,  
15 including all documents and communications that St. Jude will  
16 offer into evidence on any hearing on the motions. Let me say  
17 this to start, I'm not going to direct St. Jude to identify  
18 what it's going to use. I think that impinges on the work  
19 product of the attorney. So, you can't get it that way. It's  
20 easy to take a piggy-back ride on imposing counsel. I'm not  
21 going to make him do that but production of documents relating  
22 to facts or assertions in the motion and the objection is, once  
23 again, overbroad and not proportional. And, well, I'll let St.  
24 Jude respond.

25 MS. BIALZIK: Well, again, it - the issue is that

1 this communications idea that we were going to have to go  
2 search through archived e-mails or anything that might have a  
3 reference to something seemed to us overly broad. We've, you  
4 know, we've produced the evidence that we have that we intent  
5 to rely on. We've offered up the actual people on the ground  
6 for deposition and we felt that it was overly broad for us to  
7 have to be going and searching through archived e-mails that  
8 may or may not even exist at this point.

9 THE COURT: Trustee, anything to add?

10 MR. RUKAVINA: No. I think Your Honor has ruled on  
11 that and I hear you loud and clear about getting a sneak peek  
12 of their evidence. I hear you on that, Your Honor.

13 THE COURT: Okay. On having said that again, Mr.  
14 Rukavina, I'm hearing some difficulty with the signal with  
15 hearing what came through.

16 MR. RUKAVINA: I'm sorry, Your Honor. Can you hear  
17 me now?

18 THE COURT: Yes, I can.

19 MR. RUKAVINA: What I was saying, Your Honor, was  
20 that I think you've already ruled on the communications part of  
21 that.

22 THE COURT: Yes.

23 MR. RUKAVINA: And I hear you on the evidence and I  
24 understand that you're not going to grant that and that's just  
25 fine.

1                   THE COURT: Right. So, I think St. Jude needs to  
2 amend its response within 14 days to delete the objections. I  
3 agree that it need only comply with the scheduling order for  
4 production of the exhibits it intends to introduce and I don't  
5 think I need to make any further ruling on that.

6                   Number 5, communications between St. Jude and third-  
7 parties related to any demand for payment, claims submitted or  
8 payment received by St. Jude against or from such third-party  
9 on account of the debtor's failure to pay. St. Jude said  
10 there's no documents.

11                   Trustee?

12                   MR. RUKAVINA: If they delete the general objections,  
13 then we're happy with their response that there's no documents.

14                   THE COURT: St. Jude?

15                   MS. BIALZIK: All right. We've already stated in  
16 writing that we are not withholding anything. Based on general  
17 objections I think we have effectively already done that. So,  
18 I don't think that there's anything that we're litigating about  
19 here.

20                   THE COURT: Okay. So, amend the response within 14  
21 days to delete the subject to the general response. All right.  
22 Number 6, documents and communications that support your  
23 answers to the interrogatories not otherwise requested in  
24 another request. I don't know that I need to rule on this  
25 other than to direct St. Jude to amend its response to delete

1 The general objections or the objections within 14 days. Does  
2 that make sense to you both?

3 MR. RUKAVINA: It does to me, Your Honor.

4 MS. BIALZIK: Yes, Your Honor.

5 THE COURT: St. Jude?

6 MS. BIALZIK: Yes, Your Honor.

7 THE COURT: All right. Good. Number 7, different  
8 pricing charged different customers. Trustee, why is this  
9 relevant to anything?

10 MR. RUKAVINA: Well, Your Honor, we did in our  
11 response admit that this was a little overbroad and perhaps  
12 premature. It is relevant to the question of value for  
13 503(b)(9). As Your Honor will hear later, we have something  
14 like two hundred, three hundred thousand dollars of heart  
15 valves that in the last year we have not been able to sell.  
16 We're looking to donate them to a hospital in India.

17 Now, this may be premature but let's assume -- and I  
18 have no evidence of this -- let's assume that St. Jude sells us  
19 a heart valve for \$20,000 but Baylor, Scott and Wolfe for  
20 \$10,000? That would be relevant. But, again, I concede that  
21 this is overly broad and I think that the Court should instruct  
22 me to discuss this with opposing counsel within reason once the  
23 general and boilerplate objections are removed so we can have a  
24 meaningful discussion about this.

25 THE COURT: St. Jude?

1 MS. BIALZIK: Your Honor, we adamantly feel that this  
2 is overbroad and is seeking confidential, irrelevant  
3 proprietary information. There is no case law that the Trustee  
4 has pointed us to. We've invited him to find us any case law  
5 that would support his idea that pricing that St. Jude may have  
6 had with other customers could be relevant to the question of  
7 value. There is case law that we have cited. The Semorude  
8 case clearly states that the invoice price is the presumptive  
9 identification of the value. He's provided no authority that  
10 would suggest that it would be different.

11 And this -- these 503(b)(9) cases, Your Honor, are  
12 filed every day. And every day they are for goods sold. And  
13 if there was some authority that backed the inquiry should be  
14 looking at the seller's pricing to other customers negotiated  
15 likely on an individual basis to other customers, is relevant  
16 or something that the Court should be looking into, there would  
17 be case law supporting that.

18 THE COURT: All right.

19 MS. BIALZIK: So, I just think this is --

20 THE COURT: Trustee, final response?

21 MR. RUKAVINA: The Semorude case, Your Honor, says  
22 that the price charges of presumptive, pardon me, is the  
23 presumptive price which can be overcome by the Trustee. But,  
24 again, I can see that as written this is too broad. And I'd be  
25 happy to --

1 THE COURT: Right. I'm going to sustain the St.  
2 Jude's objection to this. I don't think you're entitled to get  
3 into St. Jude's pricing or its relationship with third-parties.  
4 I think that is classic proprietary information. And let's  
5 move now to the second set of requests for production.

6 Number 1 is -- I'm paraphrasing here  
7 communications between St. Jude and Richard Genovese including  
8 Richard Genovese, Jr., mentioning Walnut Hill, including  
9 invoices and other documents. And the response is overbroad,  
10 not proportional to the needs of the case.

11 | Trustee?

12 MR. RUKAVINA: Your Honor, request 1 through 8 are  
13 substantially the same. Those are people we believe, from the  
14 invoices, that were salesmen or people who delivered the  
15 physical goods. And primarily the issues here relate to  
16 communications, which I think Your Honor has already ruled on.  
17 Also we are requesting any contracts that St. Jude might have  
18 with those salesmen.

19 Now, SL. Jude says that these are employees so there  
20 may very well not be any contracts buying if that's the  
21 response. But if they are third-party sales people, then  
22 whether they have any contracts is relevant. For example, when  
23 and how and under what circumstances did they release a heart  
24 valve to the debtor?

So, all of these 1 through 9 just go to what we've

1 already discussed, which is what was the actual practice on the  
2 ground, consignment or not, with respect to how and when the  
3 debtor ordered a part and how and when St. Jude provided that  
4 part and how and when the debtor was to pay for that part.

5 THE COURT: All right. Well, this is broader than  
6 contracts.

7 St. Jude?

8 MS. BIALZIK: Yeah. Your Honor, our issue with this  
9 was not simply the burden of searching archived e-mails. It's  
10 also that it's extremely broad. It's talking about any  
11 communications that relate to or mention the debtor. This  
12 would include everything that he might have about his sales  
13 territories, his compensation. And he may well have employment  
14 agreements that talk about his own compensation or benefits or  
15 how he has a sales strategy.

16 I don't see how any of this has to do -- particularly  
17 with this limited question of whether there was a consignment  
18 inventory. We can look for some e-mail communications -- we've  
19 already said we're going to do that -- but beyond that, if it's  
20 not an e-mail communication that's directly talking about  
21 something relating to this consignment theory, I don't see how  
22 this has any relevance, particularly because they can take his  
23 deposition.

24 And I'd also like to point out that these are -- 1  
25 through 8 -- essentially the same request but only this first

1 one, Richard Genovese, goes to a sales agent who was involved  
2 in the Hand Carry (phonetic) business. The rest are sales  
3 agents who happened to be mentioned on FedEx. And my  
4 understanding is there's no suggestion that FedEx inventory  
5 could have been consignment. It's clearly delivered by FedEx.  
6 So, after Mr. Genovese there's no reason that any of these  
7 sales agents have any relevance to anything.

8 MR. RUKAVIN: But, Your Honor

9 THE COURT: But the fact that it's FedEx doesn't  
10 preclude a consignment arrangement, I think. You could FedEx  
11 something in the hospital and they can put it on the shelf in  
12 the supply room, they keep it for the next procedure. But --

13 MS. BIALZIK: But they bill for it, Your Honor.

14 THE COURT: -- be that as it may --

15 MS. BIALZIK: But they bill for it immediately. So  
16 then it's not a consignment because it's paid for immediately,  
17 which means it's not something where it's sent by FedEx and  
18 held until some later date. It's billed for contemporaneously  
19 with FedEx. So there's no way that that could be part of some  
20 sort of consignment inventory.

21 MR. RUKAVINA: Your Honor, this is part of what we  
22 attempted to discuss during our discovery conference dispute  
23 call. What the Trustee wants, only, are communications that  
24 mention the debtor and only any contracts that govern Mr.  
25 Genovese's or these other salesmen's deliveries and releases.

1 We don't want employment files. We don't want disciplinary  
2 files. We don't want tax files. We don't care about other  
3 hospitals.

4 So, what we want are communications that mention the  
5 debtor, which I think Your Honor has covered and then  
6 contracts, if any, and there may very well not be that -- where  
7 St. Jude tells Mr. Genovese or these other people, okay, here  
8 is when, how and why you release a particular good to the  
9 debtor.

10 THE COURT: All right. Let me see if I can parse  
11 this. You're satisfied with my order with regard to  
12 communications that that is broad enough to cover  
13 communications that these employees concerning Walnut Hill,  
14 correct?

15 MR. BUKAVINA: Absolutely, Your Honor. Yes.

16 THE COURT: All right. Now, let's go to employment  
17 contracts. St. Jude, do these contracts, assuming there are  
18 contracts, I happen to know not with St. Jude but other medical  
19 supply businesses, that there are, if there -- even if there's  
20 an employee relationship, there is a contract governing that  
21 relationship. Do those contracts with St. Jude address  
22 delivery of product to hospitals in any way that would touch on  
23 any of the issues here?

24 MS. BIALZIK: Your Honor, we asked St. Jude and they  
25 indicated that they don't have some sort of global employment

1 contract that would touch on this. What they might have are  
2 agreements regarding compensation or benefits. But they don't  
3 have a contract with these sales agents that governs the manner  
4 in which they perform their job and is what we've been told by  
5 St. Jude.

6 MR. BUKAVINA: And, Your Honor, we would take that as  
7 a response to this discovery request if that is, in fact, the  
8 case. No problem.

9 THE COURT: All right. So, let's do this. To  
10 eliminate any ambiguity, and I know you know that if some  
11 document turns up later on, it's not going to reflect well on  
12 the parties, so, you can amend your responses to Request 1  
13 through N, I guess "N" being 9, the second set of requests for  
14 production to remove the general objections and the others  
15 directed to breadth of discovery and the burdensome nature of  
16 the discovery to specify that there are no contracts, right?  
17 And I think my ruling on communications in the first set of  
18 requests addresses everything else. So, if we have to tweak  
19 those responses to reflect that, I think that covers it.

20 Now, what are we left now?

21 MR. BUKAVINA: I think we're left with Number 9.  
22 Your Honor just ruled on Number 9. I don't know if you  
23 intended to or not. Number 9 is really cumulative of  
24 everything else we've discussed today.

25 THE COURT: Oh. Yes. I'm sorry. I thought Number 9

3 was in light of our argument -- Number 9 was yet another  
2 employee.

3 MR. RUKAVINA: It's just --

4 THE COURT: Okay.

5 MR. RUKAVINA: -- cumulative of everything else. So  
6 I think if the Court has ruled on communications and I think if  
7 St. Jude responds that there are no contracts other than been  
8 produced, then I think we're fine.

9 THE COURT: Right. I think Request Number 9 is  
10 cumulative so I'm going to sustain St. Jude's objection to  
11 request Number 9 as cumulative.

12 Is that explicit enough for everyone?

13 MR. RUKAVINA: It is for the Trustee, Your Honor.  
14 The last thing we had was we have requested reasonable  
15 attorney's fees.

16 THE COURT: Right. I'm not going to award attorney's  
17 fees. I think that St. Jude made it's objections in good faith  
18 and both of you are coming before a new judge for the first  
19 time. So, I think this is passionate advocacy is a good  
20 thing. I think that maybe we got a little bit out of hand on  
21 this. I don't think that - I think there's more heat than  
22 light generated in this dispute. All right? Let me put it  
23 that way for the scientists among you.

24 So, I'm not going to award attorney's fees but I  
25 would prefer not to see a motion like this again. So please